Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 8, 2018

CLAIM NO. 201686069

CHARLES ZELCH PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

UNITED PARCEL SERVICES AND
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Charles Zelch ("Zelch") appeals from the Opinion and Order rendered November 27, 2017 by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ found Zelch did not timely provide notice of an alleged March 3, 2016 neck injury while moving boxes of batteries at work, and dismissed his claim against United Parcel Service ("UPS").

Zelch also appeals from the February 23, 2018 Order denying his petition for reconsideration.

On appeal, Zelch argues the ALJ erred in dismissing his claim and that he met his burden of proof in establishing he provided due and timely notice of a cervical spine injury. Because substantial evidence supports the ALJ's dismissal of the claim for failure to provide timely notice, and no contrary result is compelled, we affirm.

Zelch, a resident of Louisville, Kentucky, filed a Form 101 on July 15, 2016 alleging he injured his right shoulder, right arm, neck and upper back on March 3, 3016 while unloading boxes of batteries at work. Zelch has worked as a car washer for UPS since October 2006.

UPS filed a Special Answer asserting Zelch had unreasonably failed to follow medical advice. In its Form 111, UPS denied the claim based upon lack of causation/work-relatedness, lack of due and timely notice pursuant to KRS 342.185, no injury as defined by the Act, and failure to follow reasonable medical advice. Since Zelch's medical treatment and subsequent impairment are not subject of this appeal, only the lay testimony will be discussed.

Zelch testified by deposition on September 22, 2016, and at the hearing held September 25, 2017. Zelch completed the eleventh grade, and subsequently obtained a GED

while serving in the U. S. Army. He testified he was involved in a motor vehicle accident ("MVA") in 1976. He was thrown through the windshield of a vehicle in which he was riding as a passenger when it struck a tree. He was involved in another MVA in 2008 when a tree limb crashed through the windshield of a vehicle he was driving and struck him in the face. In addition to working at UPS since 2006, he has also worked in animal control/removal, and in residential maintenance. Although his job title is officially listed as a car washer, his actually duties involve moving vehicles in the UPS lot, and unloading them. He stated the job requires lifting up to seventy pounds and twisting.

Zelch testified he had no neck problems prior to moving boxes of batteries on March 3, 2016. On March 3, 2016, he was assisting in moving seventy boxes of batteries weighing sixty-eight pounds each. He testified he reported his injury to Jessica Sublett ("Sublett"), his supervisor, and to Todd Coke ("Coke") who was the supervisor over the package truck drivers. He reportedly advised of a better process in unloading and handling the batteries, and reported his injury in the process. He did not ask for medical treatment. He stated he also reported the injury again on March 4, 2016. On March 3, 2016, he was already taking Hydrocodone for his right shoulder and chest, which he had taken since the 2008

MVA. He stated he sought medical treatment several days later.

On April 25, 2016, he again reported his injury to Sublett. He was sent to Baptist Worx, and was subsequently referred to Dr. Gregory Nazar who eventually performed a discectomy and fusion at C6-7 utilizing titanium parts. He developed a rash, and the titanium was eventually removed and replaced with cadaver bone. He was off work from May 24, 2016 until November 30, 2016, when he returned to the same job he was performing on March 3, 2016, but reported difficulty rotating his head. Zelch testified his surgeries were paid for by his health insurance, and he received some short-term disability benefits while he was off work.

Sublett testified by deposition on October 9, 2017. She is the operations superintendent at UPS. She oversees several departments, including the car wash employees. Zelch is one of the employees she supervises. She testified that if a work injury is reported, it is logged into a computer system, and the employee is provided medical care, if needed, such as a referral to Baptist Worx. She testified Zelch had received training in the proper reporting of work injuries. She testified he did not report a work injury on either March 3 or 4, 2016. She noted that on March 3, 2016, Zelch complained of where boxes of batteries were stacked because

of egress issues. He made no complaint of an injury at that time. She stated that prior to March 3, 2016, she had occasionally observed Zelch twisting and turning his neck in an attempt to stretch or pop it. He still does this, and continues to work without restrictions.

Zelch first reported an injury to her on April 26, 2016. A first report of injury was completed. The injury report was entered into the computer system, and he was referred to Baptist Worx. She noted he received a period of short-term disability benefits in March 2016.

Coke also testified on October 9, 2017. He is the business manager for the Louisville West Center. He testified all UPS employees receive training in the proper protocol for injury reporting. He testified Zelch did not report an injury to him on either March 3 or 4, 2016. On March 3, 2016, Zelch complained about the loading of boxes of batteries from a new customer. Zelch made suggestions for improving the process, which were implemented. Zelch stated if changes were not made, someone would be injured. Zelch specifically stated he had not been hurt or injured while working with the batteries.

A telephonic benefit review conference ("BRC") was held on July 26, 2017. The BRC Order and Memorandum reflects the contested issues included benefits per KRS 342.730, work-relatedness/causation, notice, unpaid or contested medical

expense, injury as defined by the Act, TTD, and exclusion for active disability or impairment.

The ALJ issued the Opinion and Order on November 27, 2017, dismissing Zelch's claim. She determined he failed to provide due and timely notice of his claim. The ALJ specifically found as follows:

> As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).
>
> **I. NOTICE**
>
> KRS 342.185(1) reads, in relevant part, as follows:
>
> > Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof. . .

KRS 342.200 reads, in relevant part, as follows:

> The notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause.

Plaintiff has alleged a work injury to his right shoulder, right arm, neck and upper back as the result of an alleged work accident on March 3, 2016. On this date, Plaintiff was required to unload seventy sixty-eight pound boxes of batteries. Plaintiff's testimony was emphatic that he experienced an onset of symptoms while unloading batteries. Plaintiff further testified he informed numerous people of the injury, including, Mr. Coke, Ms. Sublett, and Mr. Faust. The Defendant contests due and timely notice, citing the testimony of Mr. Coke and Ms. Sublett. After a careful consideration of the evidence, this ALJ finds Plaintiff failed to provide due and timely notice of the alleged March 3, 2016 injury.

It is uncontroverted that Plaintiff suggested modifying the manner batteries should be unloaded on March 3, 2016. Mr. Coke acknowledged a conversation with Plaintiff regarding unloading batteries and modifications suggested by

> Plaintiff. However, Mr. Coke was clear that Plaintiff failed to report a work injury. Plaintiff presented to Dr. Helvey on March 10, 2016 who failed to give causation. Thus, Plaintiff sought treatment a week after the alleged work injury, but Dr. Helvey did not relate Plaintiff[sic] symptoms to any alleged work injury. Plaintiff returned to Dr. Helvey on April 7, 2016 and again causation was not documented.
>
> A First Report of Injury was completed on April 26, 2016 and the Defendant promptly referred Plaintiff for medical treatment at Baptist Health Occupational Medicine. Plaintiff presented to Baptist Worx on April 25, 2016, almost two months after the alleged work injury. Between March 3, 2016 and prior to Plaintiff's presentation at Baptist Worx, Plaintiff presented to Dr. Helvey on two separate occasions and causation was not addressed. This ALJ is not convinced Plaintiff reported the work injury on March 3, 2016 as he claims. His testimony is controverted not only by the testimony of Ms. Sublett and Mr. Coke, but also by Dr. Helvey's treatment records, as noted by Dr. Bilkey. Ms. Sublett testified, had Plaintiff reported a work injury, she would have followed protocol. Protocol was indeed followed when Plaintiff reported the alleged work injury in April, 2016. Thus, this ALJ finds Plaintiff failed to provide due and timely notice of the alleged work injury. As such, Plaintiff's claim for benefits is dismissed with prejudice.

Zelch filed a petition for reconsideration, arguing he had met his burden of proof in showing he had provided due and timely notice of his work injury, and dismissing his claim

constituted patent error. He argued the record is "uncontroverted" that he provided notice to his employer of his difficulty with moving the shipment of batteries. He also argued he testified he notified he supervisors of his injury on March 3, 2016, and the ALJ should revise her determination.

The ALJ issued an order denying the petition for reconsideration on February 23, 2018. The ALJ specifically found as follows:

> This matter comes before the Administrative Law Judge ("ALJ") upon Plaintiff's petition for reconsideration. Plaintiff requests the ALJ set aside her dismissal of Plaintiff's claim for failure to provide due and timely notice. Plaintiff cites evidence in support of his assertion that he provided due and timely notice, consisting primarily of Plaintiff's testimony. This ALJ previously considered Plaintiff's testimony prior to issuing her opinion. This ALJ likewise noted contradictory evidence, including testimony from employer representatives and Dr. Helvey's treatment records. Upon petition, Plaintiff puts forth many of the same arguments he presented in his brief. Those arguments, and supporting evidence, were considered prior to this ALJ issuing her opinion dismissing the claim. The ALJ has once again considered those arguments and stands by her previous findings. After reviewing this matter and the ALJ being in all ways sufficiently advised, it is hereby ordered as follows:

> Plaintiff's petition for reconsideration is over-ruled.

On appeal, Zelch argues he met his burden of proof in showing he provided due and timely notice of an injury. He argues the ALJ committed reversible error in dismissing his claim for a work-related neck injury, and a contrary result is compelled.

As the claimant in a workers' compensation proceeding, Zelch had the burden of proving each of the essential elements of his cause of action, including timely providing notice of an injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Zelch was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as that which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable based on the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value supporting her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.185 requires notice of a work-related accident be given to the employer, "as soon as practicable after the happening thereof." While notice is mandatory, the Court of Appeals has indicated, "The statute should be liberally construed in favor of the employee to effectuate the beneficent purposes of the Compensation Act." Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814, 816 (Ky. 1968).

Whether notice has been given as "soon as practicable" depends upon the circumstances of the particular case. Id. Notice to an employer of a physical injury carries with it notice of all conditions that may reasonably be anticipated to result from that injury. *See* Dawkins Lumbar Co. v. Hale, 299 S.W. 991 (Ky. 1927). *See also* Reliance Die Casting v. Freeman, 471 S.W.2d 311 (Ky. 1971). Additionally, the statute does not necessarily require an injured worker to be aware of and report each injury resulting from an accident, but must report the accident itself. Id.

The Kentucky Supreme Court held in Granger v. Louis Trauth Dairy, 329 S.W.3d 296 (Ky. 2010), the ALJ correctly dismissed a claim based upon inadequate notice, and affirmed the ALJ's refusal to find an excusable delay in reporting the injury pursuant to KRS 342.200. The Court noted the purpose of the notice requirement is threefold: to enable an employer to provide prompt medical treatment in an attempt to minimize the worker's ultimate disability and the employer's liability; to enable the employer to investigate the circumstances of the accident promptly; and to prevent the filing of fictitious claims. The Court additionally noted that although a lack of prejudice to the employer excuses an

inaccuracy in complying with KRS 342.190[1], it does not excuse a delay in giving notice.

Having failed to convince the ALJ that he gave notice of the accident and resulting injury "as soon as practicable", Zelch's burden on appeal is to show the ALJ's decision was unreasonable under the circumstances because overwhelming evidence compelled a favorable finding. While Zelch has identified evidence supporting a different conclusion, primarily his own testimony, substantial evidence was presented to the contrary. Testimony was conflicting as to whether Zelch informed his supervisors he sustained a work-related neck injury. While Zelch testified that he advised Sublett and Coke he injured his neck at work, they testified to the contrary, and outlined the procedure that would have been followed if he had done so.

The ALJ found the testimony of Sublett and Coke more credible regarding whether Zelch provided due and timely notice. The ALJ also relied upon Dr. Helvey's treatment records as noted by Dr. Warren Bilkey for treatment between March 3, 2016 and April 25, 2016. The ALJ determined Zelch did not provide notice of the alleged March 3, 2016 work

[1] KRS 342.190 requires notice to be provided in writing, and must include the name and address of the employee, the time, place of occurrence, nature and cause of the accident, as well as the nature and extent of injury.

injury until April 25, 2016. The ALJ determined this was not "as soon as practicable." It was within the ALJ's discretion to determine which evidence to rely upon, and it cannot be said that her conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, supra. Substantial evidence supports the finding that Zelch's notice was not reasonable or timely, and no contrary result is compelled.

Accordingly, the November 27, 2017 Opinion and Order, and the February 23, 2018 Order on petition for reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JOSEPH MAYHORN
401 WEST MAIN ST, STE 1910
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON CHRISTOPHER G NEWELL
10503 TIMBERWOOD CIRCLE, STE 112
LOUISVILLE, KY 40223

ADMINISTRATIVE LAW JUDGE:

HON STEPHANIE L KINNEY
657 CHAMBERLIN AVE
FRANKFORT, KY 40601